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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 149.

ARMOUR & COMPANY, AND ARMOUR & COMPANY
OF TEXAS,

Appellants,

VERSUS

CITY OF DALLAS, THE TEXAS & PACIFIC RAILWAY
COMPANY, PEARL WIGHT, AS RECEIVER OF THE
TEXAS & PACIFIC RAILWAY COMPANY, AND
WHOLESALE DISTRICT TRACKAGE COMPANY,

Appellees.

*Brief for The Texas & Pacific Railway Company and
Pearl Wight, Receiver of The Texas & Pacific
Railway Company, Appellees.*

THOMAS J. FREEMAN,
Solicitor for Appellees.

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STATEMENT.

This is an appeal by the appellants, Armour & Company and Armour & Company of Texas, plaintiffs in the Court below, from a decree of the United States District Court for the Northern District of Texas, made on June

7, 1919, in favor of the defendants below and dismissing plaintiffs' bill. (See page 74 of the printed record.)

The cause was tried by the District Court upon the bill, answer of all of the defendants, and proof upon part of both plaintiffs and defendants.

The appellants in their bill sought an injunction to prevent The Texas & Pacific Railway Company, and its Receiver, from executing a contract with the City of Dallas and the Wholesale District Trackage Company to remove, and from removing, tracks of The Texas & Pacific Railway Company over and along Pacific Avenue in the City of Dallas, Texas, including a switch or industry track serving the plant of the appellants herein, the appellants contending that the removal of the tracks will destroy the use of the industry track constructed to serve the plant of the appellants which plant is adjacent to the main line tracks of The Texas & Pacific Railway Company on Pacific Avenue in the City of Dallas.

The pleadings and evidence in this proceeding disclosed in substance the following facts:

That, for many years prior to 1912, The Texas & Pacific Railway Company had and used tracks on Pacific Avenue in the City of Dallas, its authority to do so being conferred by municipal ordinances.

In July, 1912, the City Council of the City of Dallas passed an ordinance granting to The Texas & Pacific Railway Company the right and privilege to construct a switch track on Pacific Avenue, the location of the track being designated and defined in the ordinance. The purpose of this track was to serve the plant of Armour & Company of Texas. The ordinance under which this industry track was constructed contained provisions as follows:

"Sec. 2. That the right, privilege, and franchise hereby granted is granted subject to the city charter of the City of Dallas, and such future charters and ordinances as may hereafter be passed, and the city expressly reserves the right to at all times amend or alter the ordinance hereby granted.

"Sec. 3. That the right and privilege hereby granted is granted for a period of twenty years from the date of the acceptance of this ordinance, as herein provided for, and provided that in the event the said Railway Company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific Avenue, then in that event this franchise shall be subject thereto, and the said grantee shall, during said time, pay, on the second day of January in each and every year, the sum of ten dollars per year, as a bonus for the right, privilege, and franchise hereby granted: provided that ten dollars shall be paid for the year 1912.

"Sec. 4. That in accordance with the agreement heretofore made between the City of Dallas and Armour & Co., the owners of a certain lot located on the north side of Pacific Avenue, and more particularly located on the northwest corner of Pacific Avenue and Harwood Street, and extending back to Live Oak Street, which switch track is intended to serve said property, it is mutually understood and agreed that as a further consideration for this grant the grantee shall obtain from the said Armour & Co., or the said Armour & Co., shall dedicate to public use sixty-four square feet of land located at the southeast point of its said lot, where the same forms a corner of Harwood and Pacific Avenue and shall likewise dedicate to public use for street purposes thirty-five square feet of the northeast corner of its said lot, where the same forms the southwest corner of Harwood street and Live Oak

street; it being the purpose of the said dedication to round the corners at such points and to dedicate such property for street purposes, and it being understood that it requires the amount of square feet herein stated to round off said corners, all of which more fully appears from map on file in the office of the city engineer of the City of Dallas. That the dedication of said property shall be made by the said Armour & Company whose property is served by said switch, before the final acceptance of this ordinance by the grantee herein.

"That in the event the said Armour & Co., should fail or refuse to make said dedication, it is expressly understood between the parties that the City of Dallas may repeal and cancel the rights and privileges granted under this ordinance, by resolution or otherwise."

The Tracks of The Texas & Pacific Railway Company traverse the City of Dallas from its extreme Eastern boundary to its extreme Western boundary, running through the heart of the business district of the City of Dallas, the City of Dallas being located North and South of its tracks.

That, as a result of the growth of the City of Dallas since the Railway Company commenced to use Pacific Avenue for its tracks, there has been great increase, both of railway and other traffic on that street, and of other traffic along streets crossing Pacific Avenue in the locality of the industry or switch track serving of Armour & Company's plant.

Pacific Avenue divides the principal residence section of the City from its principal retail and shopping districts. The Tracks on Pacific Avenue are within a very short distance of the leading retail district and the most used thoroughfare of the city.

On account of the location of the tracks on Pacific Avenue, and the great number of trains passing over same daily, traffic is greatly congested and the public interest and safety demanded either the raising or lowering of these tracks, or the removal of them from Pacific Avenue.

This situation had existed quite a time prior to 1912, the date of the ordinance authorizing the construction of the industry track to Armour & Company of Texas' Plant, and the matter of removing the tracks from Pacific Avenue had been agitated long before this ordinance was passed and was continuously agitated thereafter. (See F. McNeny's testimony, page 117-119 of the printed record.)

There was evidence to support the conclusion that it was impracticable to lower the tracks because the lowering of them to the required depth would subject them to overflow by the Trinity River; that the elevation of the tracks was impracticable on account of the enormous expense, and the destruction of the various tracks serving the industries along Pacific Avenue at Grade. (See testimony of J. L. Lancaster, page 102-107 of printed record.)

The situation became so acute that after repeated negotiations with the City of Dallas, The Texas & Pacific Railway Company and the City of Dallas, in connection with the Wholesale District Trackage Company, agreed on the 23rd day of August, 1918, upon a contract for the removal of the tracks from Pacific Avenue, which contract, among other things, provided the means by which The Texas & Pacific Railway Company and its Receivers could operate its trains through the City of Dallas at a point where its operation would not be a continuing nuisance and a menace to life and property.

The carrying out of this contract will result in the removal of the tracks of The Texas & Pacific Railway Com-

pany from Pacific Avenue, and will prevent the operation of its trains along Pacific Avenue, and the use of the industry track serving Armour & Company of Texas' Plant

After this contract had been agreed upon and signed, Armour & Company and Armour & Company of Texas instituted this suit to enjoin the carrying out of same, alleging, in substance that it would destroy the use of said industry track serving their plant, and to a large degree destroy the value of their plant. (See pages 1 and 19 of the printed record.)

The Texas & Pacific Railway Company answered the complaint of Armour, denying many of the allegations of the bill, and pleading specially that the ordinance under which Armour's industry track was constructed provided that it might be removed in the event The Texas & Pacific Railway Company should abandon or elevate its tracks on Pacific Avenue.

It further plead that said industry track was put in subject to the right of the City at any time to have same removed; that at all times it was subject to the right of the city, in the exercise of reasonable police regulations, to remove same and cancel the ordinance; that the safety of the lives of the public required that the tracks on Pacific Avenue should be removed; that Armour & Company had no vested rights or any contractual obligations that would be impaired by this removal; that they constructed their plant with the full knowledge of the right of the city to remove said industry track at any time it saw proper; that there was no obligation upon the part of The Texas & Pacific Railway Company to maintain said track for any period of time, and that the necessities and safety of the public required that the tracks both main and industry of The Texas & Pacific on Pacific Avenue should be changed, and

that the contract between The Texas & Pacific Railway Company, its Receivers, and the City of Dallas, to this end, was valid, and that Armour & Company had no right to interfere with its execution. (See pages 43-58 of the printed record.)

The contract is exhibited to the bill of complaint herein, and is to be found on page 26 of the record.

In addition to other allegations in appellants' bill, attacking the right of defendants herein to make said contract with the City of Dallas, the appellants attack the legality of said contract because it exceeds the charter powers of the defendant, the City of Dallas, to enter into said contract, upon the ground that it provides for the payment of One Hundred Thousand Dollars by the City of Dallas, and that no appropriation had been made with which to liquidate said sum, and, further, that said contract had not been properly executed by the City Auditor.

Among other testimony, introduced at the trial, was the following stipulation:

"It was stipulated that on May 10, 1919, Armour and Company and Armour and Company of Texas, F. M. Etheridge and J. M. McCormick filed in the District Court of the 14th Judicial District of the State of Texas, on behalf of themselves and all other taxpayers of the City of Dallas, their taxpayers' bill hereby they sought an injunction against the defendants therein named, to-wit: Texas & Pacific Railway Company, Walker D. Hines, Director General of Railroads, Pearl Wight, as Receiver of The Texas & Pacific Railway Company, Wholesale District Trackage Company, and the City of Dallas, to restrain them from carrying out the contract of August 23, 1918, made by the defendants other than the said Walker D. Hines, Director General of Rail-

roads; and that appended to their said bill was an affidavit to the effect that all of the District Judges in the City of Dallas were taxpayers thereof and were disqualified from acting upon the bill, and therefore the said bill was presented to the Honorable Horton B. Porter, Judge of the District Court of the 66th Judicial District of the State of Texas, who endorsed upon said petition a fiat ordering said petition to be filed and the injunction as therein prayed for to be issued upon the plaintiffs entering into a bond in the sum of \$10,000, conditioned and payable as required by law; that said bond was made and approved and on said May 10, 1919, an injunction was issued and served upon the City of Dallas whereby it was commanded to refrain from carrying out the said purported contract, and from giving and paying to the said Wholesale District Trackage Company the sum of \$100,000, or any other sum, and to refrain from giving to the said Texas & Pacific Railway Company, or to the Receiver thereof, 40 feet off of the north side of Pacific Avenue between Griffin Street and Lamar Street in the City of Dallas. That said defendants in said bill named perfected an appeal to the Court of Civil Appeals for the 5th Supreme Judicial District of the State of Texas from the order awarding said injunction, and said cause is now pending on said appeal." (See printed Record p. 129.)

After hearing all the pleading and the evidence the court below refused the injunction, and handed down a decree in the following terms:

"On this the 7th day of June, A. D., 1919, came regularly on to be heard the above entitled and numbered cause, and the court having heard the pleadings, evidence and argument of counsel, is of the opinion that the law is with the defendants.

"It appearing to the court, however, that as the issue presented by paragraph 22 of the Bill of Complaint, and by the Amendment to the Bill, was presented to the District Court for the 66th Judicial District of Texas, in a taxpayer's suit brought by complainants herein and others for the use and benefit of themselves and all other taxpayers of the City of Dallas, and transferred to and now pending in the District Court for the 14th Judicial District of the State of Texas, numbered 30895-A and entitled '*Armour & Co., et al., vs. The City of Dallas, et al.,*' and that therein complainants and their co-plaintiffs therein upon *ex parte* hearing, obtained a temporary injunction restraining the defendants herein, who are the defendants herein, from carrying out the contract of August 23, 1918, by and between City of Dallas, Wholesale District Trackage Company, Texas & Pacific Railway Company and Pearl Wight, as Receiver of The Texas & Pacific Railway Company, which matter of injunction is pending on appeal by such Defendants to the Court of Civil Appeals for the 5th Supreme Judicial District of Texas, at Dallas, this Court is of the opinion that it ought not to grant relief on account of such issue;

"It is, therefore, ordered, adjudged and decreed by the court that the plaintiffs' original bill of complaint, and the amendment thereto, be, and the same are hereby, dismissed at the cost of the plaintiffs. The plaintiffs thereupon duly and in open court excepted and gave notice of appeal to the Supreme Court of the United States." (Printed Record p. 74.)

"Dated June 7, 1919.

R. L. BATTS,
Judge Presiding."

It is from this decree that the appellants are appealing.

In connection with this case, I would further submit for consideration to the court that on the 1st day of March, 1918, in the District Court of the United States for the Western District of Louisiana, in cause No. 1120, Equity, entitled "*B. F. Bush, Receiver, etc., vs. The Texas & Pacific Railway Company*," in which Pearl Wight and J. L. Lancaster had been appointed Receivers, the appellants in this cause filed their plea of intervention against The Texas & Pacific Railway Company and Pearl Wight as Receiver of The Texas & Pacific Railway Company alleging the same identical facts which are set forth in this cause, and seeking the same identical relief that they are seeking in this cause, with the same identical issues that are involved in this cause, and with the same identical parties, except that the City of Dallas and the Wholesale District Trackage Company were not made parties.

The relief sought in that intervention is founded on the same facts as is the relief sought in this cause, and the essential bases of the relief sought in that cause and that sought in this cause are the same.

This intervention was tried in the District Court of the United States for the Western District of Louisiana and on the 9th day of December, 1918, a decree was handed down denying the relief sought therein which was identical with the relief sought in this cause.

This intervention was, in due course, appealed by the plaintiffs therein, who are the appellants in this cause, to the Circuit Court of Appeals for the 5th Circuit, and on May 5, 1919, the Circuit Court of Appeals for the 5th Circuit handed down its opinion, affirming the opinion of the District Court. This case is reported in 258 Federal Reporter, 185.

From the decree of the Circuit Court of Appeals for the 5th Circuit, the appellants herein filed in this Court their petition for writ of certiorari which writ was contested by The Texas & Pacific Railway Company and by Pearl Wight, the then Receiver of The Texas & Pacific Railway Company. Said petition for writ of certiorari was No. 466 on the Docket of this Court and entitled "Armour & Company and Armour & Company of Texas, vs. The Texas & Pacific Railway Company and Pearl Wight, Receiver of The Texas & Pacific Railway Company." This petition came on to be heard by this Court and on November 17, 1919, this Honorable Court handed down its decision by which it ordered that said petition for writ of certiorari be denied. (See printed record in cause No. 466, October Term, 1919, of this Court.)

The plea of intervention in said cause was submitted on the petition of the intervenors, the appellants in this cause, the answer of The Texas & Pacific Railway Company and the Receiver of The Texas & Pacific Railway Company, which is substantially the answer in this cause, and upon evidence introduced upon the part of intervenors, the appellants in this cause, and The Texas & Pacific Railway Company and the Receivers of The Texas & Pacific Railway Company, said evidence being substantially the evidence introduced in this cause.

In said application for certiorari, and, as one of the grounds for same, these appellants stated as follows:

"Because this cause should be brought to this court and be consolidated with the cognate cause of *Armour and Company, et al.*, appellants, vs. *City of Dallas, et al.*, appellees, now pending in this court on appeal."

ARGUMENT.

The primary and sole purpose of appellants in this cause, as evidenced by their bill is to restrain the City of Dallas and The Texas & Pacific Railway Company from entering into and carrying out the contract dated August 23, 1918, Exhibit D to appellants' bill, the basis of attack upon said contract being that the city had no authority to make same, in view of the ordinance authorizing the construction of the industry track to Armour and Company's plant, and that the carrying out of said contract would destroy said industry track to said Armour and Company's plant, and that the carrying out of said contract and the removal of said track would, in effect, deprive appellants of their property without due process of law, and in violation of the prohibition against any state passing a law impairing the obligation of contracts.

The appellees respectfully submit that said contract is valid in all of its terms and conditions and that the City of Dallas, The Texas & Pacific Railway Company and the Receiver of The Texas & Pacific Railway Company had full authority to make same, and that the appellants herein have no right whatsoever that they are entitled to have protected under said contract, and, in support of their contention, they submit the following propositions of law and statement of facts.

I.

It is undisputed that the City of Dallas, being incorporated under a special charter, had full authority and right to pass reasonable police regulations. (See Charter, City of Dallas, Sec. 1, Art. 2, page 89 of the record.)

(a) A city incorporated under a special charter has

the authority to pass reasonable police regulations necessary to secure the public safety.

Northern Pacific Ry. Co. vs. Duluth, 208 U. S. p. 583.
(Cited and approved in case of *Great Northern Railway vs. Clara City*, 246 U. S. p. 437.)

(b) The City of Dallas had the right to require the railway company to lower or elevate its tracks, or to make any other arrangements concerning said tracks so as to make their use reasonably safe and convenient for public use.

C. I. & W. Ry. vs. Cornersville, 218 U. S. p. 336.
Northern Pacific Ry. vs. Duluth, 208 U. S. p. 583.
Great Northern Ry. vs. Clara City, 246 U. S.
p. 437.

(c) Although the City of Dallas could not require The Texas & Pacific Railway Company to abandon its tracks on Pacific Avenue, and remove them therefrom, (see case *Grand Trunk Western Railway vs. South Bend*, 227 U. S. p. 553), this would not prevent The Texas & Pacific Railway Company and the City of Dallas from agreeing that the tracks might be removed from a portion of Pacific Avenue and shifted to some other portion of the City.

(d) The Texas & Pacific Railway Company, under Section 5 of its Charter (Acts of Congress of the United States, March 3, 1871, Ch. 122, 16th Statutes at Large), had the right to make a trackage agreement with other lines, and it appears in this record that The Texas & Pacific Railway Company has made an agreement with the Houston & Texas Central Railroad Company by which its tracks can be shifted from Pacific Avenue and its trains brought

over the line of the Houston & Texas Central Railroad Company instead of over Pacific Avenue. (See page 29 of the printed record.)

(e) The police powers vested in municipalities or legislative bodies cannot be bartered or sold so as to prevent their exercise by future city councils or legislative authorities. See following authorities:

Leisey vs. Hardin, 135 U. S. p. 127, 128, 129, 131.

Fertilizer Co. vs. Hyde Park, 97 U. S. p. 659.

C. B. & Q. Ry. vs. Chicago, 166 U. S. p. 166, 226, 255.

Great Northern Ry. vs. Clara City, 246 U. S. p. 437.

(f) The police power of a city or a municipality, under a special charter, cannot be contracted away, and the uncompensated obedience to laws passed in its exercise does not contravene the Federal Constitution.

Northern Pacific Ry. vs. Duluth, 208 U. S., p. 583, cited and approved in

Great Northern Ry. vs. Clara City, 246 U. S. p. 437.

St. P. M. & M. Ry. vs. Minneapolis, 214 U. S. p. 497.

C. M. & St. P. Ry. vs. Minneapolis, 232 U. S. p. 430.

(g) It is well settled that in the exercise of its police powers a city may require a railway company to lower or elevate its tracks so as to have a separation of grades, and this too at the entire expense of the Railway Company.

C. B. & Q. Ry. vs. Nebraska, 107 U. S. 57.

(h) It is also well settled that all franchises granted by cities are subject to the power of the municipality to pass reasonable police regulations necessary to secure the public safety.

Northern Pacific Ry. vs. Duluth, 208 U. S. p. 583,
cited in *Grand Trunk Ry. vs. South Bend*,
227 U. S. p. 553.

None of these authorities hold that a city by the exercise of a police regulation can deprive a railway company of a franchise once granted, but these authorities hold that the use of a franchise may be regulated so as to preserve the current rights of the public and the company.

Grand Trunk Ry. vs. South Bend, 227 U. S.
p. 553.

The City of Dallas could not require The Texas & Pacific Railway Company to abandon its franchise through the City of Dallas, even though this was in the exercise of a police regulation, as the franchise possessed by The Texas & Pacific Railway Company from the City of Dallas is a contract and its use could not be impaired or taken away from The Texas & Pacific Railway Company even by virtue of the exercise of a police regulation (see case *Grand Trunk Railway vs. South Bend*, 227 U. S. p. 553), but the use of its franchise may be regulated, and the Company and the City may agree upon the nature of this regulation.

(i) A Receiver, in the exercise of his sound discretion, may abrogate contracts made by the Company prior to the Receivership, and no action for damages will lie against the Receiver for such breach.

Brown & Sheldon vs. Warner, 78 Texas Supreme
Court, p. 543.

II.

In this case the appellants are seeking the aid of a court of equity to enforce specific performance of an alleged contract between appellants, The Texas & Pacific Railway Company and the City of Dallas for the maintenance and operation of a switch track in the City of Dallas, serving the plant of Armour & Company of Texas.

Appellees respectfully submit the following propositions and authorities:

(a) There is no statute, either state or federal, requiring a railway company to maintain either perpetually or for any length of time industry tracks. There being no such specific duty imposed by statute, a court of equity will not lend its aid and require specific performance of such an arrangement where the party complaining has an adequate and complete remedy at law.

Northern Pacific Ry. vs. Territory of Washington, 142 U. S. p. 492, 509.

(b) A court of equity will not order a railway company to maintain a spur or industry track contrary to public interests and contrary to the exercise of a reasonable police regulation.

Texas & Pacific Ry. vs. Marshall, 136 U. S., p. 393.

Beasley vs. Texas & Pacific Ry., 191 U. S., p. 497 of Opinion.

Northern Pacific vs. Territory of Washington, 142 U. S., pp. 492, 509.

Texas & Pacific Ry. vs. Scott, 77 Fed. 726.

Armour & Co. et al. vs. Texas & Pacific et al., 258 Fed. 185.

If Armour & Company had a valid contract with The Texas & Pacific Railway Company and the City of Dallas for the construction and maintenance of the industry track serving their plant, and the City of Dallas and The Texas & Pacific Railway Company breached said contract, a court of equity would not enforce the specific performance of same, but would relegate the appellants to an action at law for damages, leaving the railroad company and the city at liberty to follow the course which their best interests and those of the public demanded.

Texas & Pacific vs. Marshall, 136 U. S., p. 393.

Beasley vs. The Texas & Pacific, 191 U. S., p. 497 of Opinion.

Northern Pacific Ry. vs. Territory of Washington, 142 U. S., pp. 492, 509.

Texas & Pacific Railway vs. Scott, 77 Fed. p. 726.

Armour & Co. et al. vs. Texas & Pacific et al., 258 Fed. 185.

In the last case cited of *Armour & Company et al. vs. The Texas & Pacific Railway Company et al.*, the plaintiffs in that case and the plaintiffs in this cause are the same identical plaintiffs, and the defendants, The Texas & Pacific Railway Company, and its Receiver, are the same identical defendants; the issues raised in that case are the same issues that are raised and involved in this cause, to-wit: to prevent the execution of a contract between the City of Dallas and The Texas & Pacific Railway Company and its Receiver, dated August 23, 1918; the same identical relief was sought in that case as is sought in this case, and the same questions were involved in that case as are involved in this case in fact, as was alleged by the appellants

therein in their application for writ of *certiorari*, the case in 258 Federal Reporter and this case are designated as "cognate causes."

In said cause the Circuit Court of Appeals for the 5th Circuit held that:

"Though meat-packing companies, acquiring valuable abutting property adapted to their business, have a contract or property right to prevent removal from a street of an industry track serving them, they cannot have relief by injunction against the city, the railroad company and a trackage company to restrain removal of the track to another street, when it appears that paramount public interests may be interfered with by granting relief, especially where there is no convincing showing of a lack of legal remedy for damages."

(d) It is not claimed that the switch track serving Armour's plant was paid for by Armour & Company of Texas or Armour & Company of New Jersey, or owned by either of them, nor was there any corresponding obligation upon either Armour & Company of Texas or Armour & Company of New Jersey; in fact, they could abandon same at any time they saw proper, and remove their plant at any time they saw proper.

The Receiver of The Texas & Pacific Railway Company was not a party to the alleged contract in any wise and to enjoin him from removing a switch track would amount to requiring specific performance by him of a contract to which he is not a party. Under such conditions a court of equity will not enforce specific performance of such an agreement.

Armour & Co. et al. vs. Texas & Pacific et al.,
258 Fed. 185.

III

Under the laws of the State of Texas railway companies under certain conditions may abandon and re-locate their line after it has once been located.

See Act 35th Legislature, State of Texas, 1918, pages 45, 47 and 196;

Also see Act 35th Legislature, State of Texas, 1918, page 196,

conferring power on the Railroad Commission of Texas to require railroads to arrange or relocate tracks when public safety may require it.

The Texas & Pacific Railway Company obtained authority from the Railroad Commission of Texas for the abandonment or removal of its tracks on Pacific Avenue in accordance with agreement made with the City of Dallas. (See certified copy of order of the Railroad Commission of Texas, page 101 of the printed record.)

The 14th Amendment does not limit the subjects over which the police power of a State may be exercised for the protection of its citizens.

Barbier vs. Connolly, 113 U. S., p. 27.

Missouri Pacific Ry. vs. Humes, 115 U. S. p. 512.

The facts in the case at bar evidence the urgent necessity for the exercise of this police regulation, as both the safety and the health and convenience of the public are involved in its enforcement.

IV

It was proper that the Court should have dismissed the bill of appellants herein when it was advised that appel-

lants had resorted to the State courts to obtain the same relief as against the same parties, and that an injunction had been obtained in the State courts, and that this injunction was pending at the time of the trial of this case.

Appellants having elected to commence their suit in the State court against the same parties who are defendants in this cause, and, having obtained injunctive relief, are not in a position in this cause to have the Court below pass upon the question as to whether or not an injunction should be granted them.

As an injunction had already been obtained covering the same matter in the State courts, the United States District Judge was not in a position to exercise his judgment in this case, as, in the event he had held that the appellants were not entitled to an injunction, he would have been in conflict with the decree of the State court which had already passed upon the matter, and the decree would have had no effect upon the final decree in the injunction suit in the State court then pending on appeal. It was proper that the Court should exercise its judgment in refusing to take any action under these conditions.

The appellants invoked the jurisdiction of the State court and obtained an injunction and were not in a position to obtain the relief sought by them in this cause.

Under the above facts and propositions of law appellees respectfully submit that Armour & Company constructed their plant on Pacific Avenue with full knowledge of the fact that the main line tracks of The Texas & Pacific Railway Company, in their operation, and the industry track serving Armour's plant, were at all times subject to the exercise of reasonable police regulations by the City of Dallas, and with full knowledge of the fact that the franchise granted to The Texas & Pacific Railway Company to

construct said industry track expressly provided that same was granted subject to any action the City might take to require The Texas & Pacific Railway Company to abandon its tracks on Pacific Avenue or to change the grade of said tracks either by raising or lowering.

This right is expressly reserved and set forth in the ordinance itself. (See page 24 of the printed record.)

The conditions surrounding the location of that portion of The Texas & Pacific Railway Company's tracks on Pacific Avenue in the City of Dallas which are sought to be changed are peculiar. The tracks are located through the business center of the city, or, rather, after the tracks had been constructed originally, the city grew up around them. The tracks of the company run east and west and the traffic of the city, crossing said tracks, runs north and south. The operation of that portion of the tracks which is sought to be removed is a menace to the safety of the public and seriously interferes with the conduct of public business and public affairs in the City of Dallas.

Owing to the fact that these Pacific Avenue tracks cross the Trinity River, the Trinity River being on the western boundary of the City of Dallas, it is not practicable to lower the tracks so as to have a separation of grades as the Trinity River at various times is subject to high water and overflows, and a lowering of the tracks on Pacific Avenue would result in the tunnel being flooded repeatedly by high water. (See testimony of J. L. Lancaster, page 102 of the printed record.)

Raising the tracks so as to have a separation of grades would not only entail an enormous expense, approximately two million dollars (\$2,000,000), and an enormous expense to abutting property owners in order to conform their business houses to the raised grade, but would also impair the

use of Pacific Avenue as a thoroughfare and would not remove the nuisance of noise, vibration, smoke, dust and cinders, caused by the operation of trains over the raised grade. (See testimony of J. L. Lancaster, page 106 of the printed record.)

The Texas & Pacific Railway Company is not abandoning its franchise granted by the City of Dallas to operate its trains through the City of Dallas, nor could the City of Dallas require it to abandon same. It is only agreeing with the City of Dallas that it will shift its tracks to some other portion of the city and make arrangements for the use of some other franchise over another portion of the City of Dallas, so as to abate the present nuisance and aid the city in the exercise of its reasonable police powers.

Long prior to the time Armour & Company constructed their plant on Pacific Avenue and obtained the industry track serving same the question had been agitated in Dallas of removing the tracks of The Texas & Pacific Railway Company from Pacific Avenue, or lowering or raising same and the City Council of the City of Dallas had this in mind when they enacted the ordinance on the 10th day of July, 1912, authorizing The Texas & Pacific Railway Company to construct this industry track to Armour's plant and, having this in mind, they inserted the following provisions in the ordinance:

"Sec. 2. That the right, privilege and franchise hereby granted is granted subject to the City Charter of the City of Dallas, and such future charters and ordinances as may hereafter be passed, and the city expressly reserves the right to at all times amend or alter the ordinance hereby granted.

"Sec. 3. That the right and privilege hereby granted is granted for a period of twenty years from

the date of the acceptance of this ordinance, as herein provided for, and provided that in the event the said Railway Company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific Avenue, then in that event this franchise shall be subject thereto. * * *

These provisions and these conditions were not embodied in the ordinance except for a specific purpose, that purpose being to retain in the city the right to cancel this ordinance if it saw proper should it become necessary to change the tracks of The Texas & Pacific Railway Company on Pacific Avenue either by lowering, raising or removing same. The fact that The Texas & Pacific Railway Company and its Receiver consented to the change of location of the tracks does not in any way impair the right of the city to exercise its reasonable police regulations in this matter. This arrangement is but the means agreed upon between the company and the city for the carrying out of a reasonable police regulation, and the carrying out of which can not in any wise be obstructed or interfered with by the appellants herein, as whatever rights they may have obtained in said industry track under said ordinance, or otherwise, were taken expressly subject to the right of the City of Dallas to exercise such a reasonable police regulation.

The peculiar conditions affecting the location of the tracks of The Texas & Pacific Railway Company on Pacific Avenue necessitated an agreement of this nature. The tracks cannot be lowered, and raising them would not abate the nuisance or in any wise relieve the situation. Under these conditions the city and the company are attempting to agree upon the exercise and the carrying out of a reasonable police regulation with the least possible damage to parties affected thereby.

Both the railroad company and its Receiver and the city are acting with full authority and in accordance with the laws of Texas, which laws expressly provide for the relocation of tracks of railway companies. This act is referred to as expressing the public sentiment upon matters of this nature. Armour & Company have no vested rights in location of The Texas & Pacific Railway Company's tracks on Pacific Avenue or elsewhere, especially in view of the fact that The Texas & Pacific Railway Company accepted the conditions of the ordinance and Armour & Company accepted the conditions of the ordinance authorizing the construction of the industry track to their plant with full knowledge of the fact that the City of Dallas would desire a change on Pacific Avenue, and the city retained the right to make this change when it became necessary. (See ordinance, page 24 of the printed record.)

If Armour & Company had any vested rights it is only in the maintenance of the industry track to their plant. No law or decision ever prohibited the change of location of an industry track or its abandonment. The only law applicable to such a situation is that if same is removed by parties who agree to maintain same, action for damages might lie against them for breach of their contract.

Brown & Sheldon vs. Warner, 78th Texas Supreme Court, p. 543.

Rut Armour & Company in this instance have no cause of action for damages against anyone; not against the Receiver, for the Receiver had full authority to abandon the track even though put in under a contract, and his abandonment would not subject him to suit for damages.

Not against The Texas & Pacific Railway Company or the City of Dallas, for by express terms of the ordinance

providing for the construction of this industry track there was embodied specific limitations and conditions, limitations and conditions written into said ordinance for the express purpose of meeting a situation such as appellants are now complaining of. As before stated, the question of removing the tracks of The Texas & Pacific Railway Company on Pacific Avenue in Dallas had long been agitated prior to the ordinance under which this track was constructed. The reasons for embodying Sections 2 and 3 of the ordinance are to be read in the light of conditions then existing. The city unquestionably intended to reserve the right to cancel the ordinance at any time it saw proper when it became necessary to take any action to require the removal of the tracks off Pacific Avenue, and Armour & Company constructed their plant with full knowledge of this ordinance and subject to all of its terms and conditions, and if Armour & Company had any contract with the city of Dallas growing out of this ordinance said contract was made expressly subject to all of the terms and conditions of the ordinance.

Under these conditions we respectfully submit that these tracks being removed by the exercise of a police regulation, if Armour & Company suffer any damage it is either *damnum absque injuria*, or, in the theory of the law, they are compensated for it by sharing in general benefits which the regulations are intended and calculated to secure.

C., B. & Q. R. R. Co. vs. Nebraska, 170 U. S.,
p. 77.

Armour & Company had no vested rights in said industry track, or in its operation, or in the main line tracks of The Texas & Pacific Railway Company on Pacific Avenue, and that same may be abandoned or taken up at any time

by an arrangement between the City of Dallas and The Texas & Pacific Railway Company in the enforcement of a reasonable police regulation.

We respectfully submit that, under the authorities, and under the facts in this cause, the Court below did not err in finding for the defendants and in dismissing the appellants' bill, and we respectfully ask that the decree of the District Court be affirmed.

THOMAS J. FREEMAN,

*Solicitor for Appellees, The Texas & Pacific Railway
Company, and Pearl Wight, Receiver.*